No. 86-1283

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1986

ROBERT KAMEAN, RAY E. COFFIE and TERRELL WILLIAMS, Individually and on behalf of all other members of Local 363, International Brotherhood of Teamsters, Chauffers, Warehousemen and Helpers of America,

Petitioners,

vs.

LOCAL 363, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFERS, WAREHOUSEMEN AND HELPERS OF AMERICA, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTION PRESENTED

In the event a named plaintiff accepts a "settlement offer" after a District Court denies its application for class action certification, does the named plaintiff have standing to appeal the order denying class certification?

This Court has specifically left this issue open. The Second Circuit opinion in this action holding that plaintiffs' lacked standing directly conflicts with a decision by the Eleventh Circuit.

This Court should not allow the conflict between the Circuits to "percolate".

PARTIES TO THE PROCEEDINGS

The following are the respondents in this Court:

Local 363, Gordon J. Canizio, Patrick Bellantoni, Aaron Kleinman and Richard Roes, individually and as officers or directors of Local 363, the latter name being fictitious and intended to represent all other directors or officers of Local 363; Douglas H. Windel, Gordon J. Canizio, Patrick Bellantoni, Joseph G. Canizio, Alfred Bellantoni, Aaron Kleinman, Anthony Cardillo, David Stoller, Russell Vensk, Eugene Iovine, Aaron Birdoff, Alan Westman, Murry Glick, Joe Joes, individually and as trustees or administrators of Local 363's Employees Benefit Trust, the latter name being fictitious and intended to represent all other trustees and/or administrors of Local 363's Employees Benefit Trust; Expert Electric, Inc., A.N. Electric Corp., Moss Electric Air Conditioning Corp., Action Electrical Contractors, Inc., Bran Electric Co., Inc., G & R Electrical Contractors, Inc., Gilston Electrical Construction Corp, Eugene Iovine, Inc., Kew Electrical Co., Inc., Lipco Electrical Corp., Monarch Electrical Contracting Corp., Newman Electrical Corp., Supreme Electrical Corp., Tap Electrical Contracting Service, Inc., Technicon-Suriano Corp., Joseph P. Tuzzulo, Inc., Avendale Electrical Contractors, Inc. and John Does, the latter name being fictitious and intended to represent all other corporations or legal entities which were a party to a collective bargaining agreement with Local 363; Frank Micellota, Joseph Guttman, Nicolo Argano, Lazar Moses Anthony Spina, Richard Siedl, Gregory Rigas, Marvin Gilston, Eugene Iovine, Fivel Kahan, Gaspare Lipari, John Livia, Victor Neuman, George Holnes, Anthony Cardillo, Joseph A. Suriano, Joseph P. Tuzzolo, Gabriel Blau, and Robert Roberts, the latter name being fictitious and intended to represent all officers, stockholders or partners of the John Does.

Petitioners, Robert Kamean, Ray E. Coffie, and Terrell

Williams, individually and on behalf of all other members of Local 363, pray that a writ of certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Second Circuit, entered in the above entitled proceeding on November 6, 1986.

Petitioners have no parents, affiliates or subsidiaries.

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No.

In The

Supreme Court of the United States

October Term, 1986

ROBERT KAMEAN, RAY E. COFFIE and TERRELL WILLIAMS, Individually and on behalf of all other members of Local 363, International Brotherhood of Teamsters, Chauffers, Warehousemen and Helpers of America,

Petitioners,

vs.

LOCAL 363, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFERS, WAREHOUSEMEN AND HELPERS OF AMERICA, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioners, Robert Kamean, Ray E. Coffie and Terrell Williams, individually and on behalf of all other members of of the putative class respectfully pray that a writ of certiorari be issued to review the judgment and opinion of the United States

Court of Appeals for the Second Circuit, entered in the above proceeding on November 6, 1986.

OPINION BELOW

The opinion of the Court of Appeals for the Second Circuit dated the 6th day of November, 1986 is unreported; the opinion of the District Court is reported at 109 F.R.D. 391 (S.D.N.Y. 1986). Both are reprinted as Appendix A and B respectively, commencing with 1a.

JURISDICTION

Petitioners brought suit in the Eastern District of New York (which was later transferred to the Southern District of New York) under 29 U.S.C. § 185(a) and 28 U.S.C. § 1132 and invoked federal jurisdiction under 29 U.S.C. §185(a), 28 U.S.C. § 1337, 18 U.S.C. § 1964, 28 U.S.C. § 1132 and principles of pendent jurisdiction.

On the 7th day of February, 1986, the District Court denied petitioners' application for class certification. On November 6, 1986, the Circuit Court dismissed the appeal to review the denial of class certification based upon a lack of standing.

The jurisdiction of this Court to review the judgment of the Second Circuit is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The issue sought to be reviewed involves the interpretation of Article III, Section 2, Clause 1 of the United States Constitution.

> The judicial power shall extend to all Cases, in Law and Equity, arising under this Constitution,

> the Laws of the United States and Treaties made, or which shall be made under their Authority — to all Cases affecting Ambassadors, other public Ministers and Consul; — to all Cases of admiralty and maritime Jurisdiction; — to Controversies to which the United States shall be a Party; — to Controversies between two or more States; — between a State and citizens of another State; — between citizens of different States; — between citizens of same State claiming Lands under Grants of different States, and between a State or the Citizens thereof, and foreign States, Citizens or Subjects.

STATEMENT OF THE CASE

The named plaintiffs commenced this action on behalf of themselves and others who were (i) either present or past members of Local 363, (ii) worked on public works contracts for contractors who had entered into a collective bargaining agreement with Local 363; and (iii) failed to receive their rightful wages and benefits as a result of a conspiracy entered into by the defendants.

The record disclosed widespread abuses and underpayments and the failure of respondent Local 363 and the Trustees of Local 363's benefit funds (Trustees) to redress the wrongs as required by the collective bargaining agreement.

Prior to the commencement of the class action, the three named plaintiffs and others complained to government authorities about the underpayments.[1] Though the government authorities had administratively determined that monies were due, none were

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1. Under the Davis-Bacon Act, 40 U.S.C. § 276(a) and New York State Labor Law § 220, employers must pay prevailing wages and benefits on federal, state and city projects.

forthcoming. Plaintiffs and others then discussed their situation and realized that complaining to Local 363 and the Trustees would be fruitless.

Messrs. Kamean, Coffie and Williams brought the action on behalf of those who had complained to governmental authorities, as well as those who had not. However, the named plaintiffs could not afford to fully finance the litigation. They requested assistance from the Joint Industry Board of the Electrical Industry (JIB). The JIB oversees and polices the electrical industry in New York City to insure, among other things, that prevailing wages and benefits are paid to electrical workers on public works projects. The JIB agreed to pay the legal fees of the litigation subject to reimbursement if counsel fees were awarded.

Though the District Court held that plaintiffs established sufficient numerosity and that there were common issues of law and fact present as required for class certification, it nevertheless denied class certification based upon what it characterized as conflicts of interest (1) among the members of the class; and (2) between the prospective class and the law firm of McDonough Marcus Cohn & Tretter, P.C. The court reasoned that the first conflict existed due to the fact that proposed class consisted of present and past members of Local 363 and the second conflict existed because a third party and not the plaintiffs was paying counsel fees.

After the court's decision and order denying class certification, a pre-trial conference was held on May 16, 1986 and a trial date set for June 2, 1986. Faced with an impending trial of the issues, the defendants offered to settle the matter with Messrs. Coffie and Williams based upon determinations of government agencies as to what the defendant employers owed the named plaintiffs. Mr. Kamean was offered binding arbitration solely on the issue of the amount owed to him by his former employer. The

defendants' attorneys represented to the court that the government agencies had withheld sufficient monies to pay the awards to Messrs. Coffie and Williams. Even though the time within which such funds were to be released was indefinite, the District Court stated that the offer was very fair and if it was not accepted a jury would be selected on June 2, 1986. The court went on to state that it was inconceivable that the settlement would be rejected by the plaintiffs and that if the case were tried on the merits, the court would stay execution on the judgment until appellate finality and until the money had been obtained from the governmental administrative agencies.

On June 2, 1986, the parties placed a stipulation on the record whereby the named plaintiffs accepted defendants' offer. The settlement, however, did not resolve the rights of other putative class members who remain uncompensated after the denial of class certification. In an effort to assist those putative class members who had contacted plaintiffs' counsel during the pendency of the instant case (25 in number), a new action was filed on their behalf, in the United States District Court for the Eastern District of New York. *See Colon v. Local 363,* No. 86-2012 (E.D.N.Y., filed June 16, 1986). This action was brought on behalf of only the 25 individual claimants. It is not a class action.

There still remain hundreds of others who were not compensated and will remain uncompensated and without remedy unless the class is certified.

REASONS FOR GRANTING THE WRIT

PLAINTIFFS, WHO ACCEPT A SETTLEMENT OFFER AFTER DENIAL OF CLASS CERTIFICATION HAVE STANDING TO APPEAL THAT DENIAL.

By dismissing the appeal below and holding that plaintiffs lacked standing to appeal the denial of class certification due to acceptance of a "settlement offer" after denial of a motion for class certification, the Second Circuit has limited appellate review beyond any previous limitations imposed by this Court and rendered a decision which directly conflicts with a decision by the Eleventh Circuit.

In *United States Parol Commission, et al. v. John M. Geraghty,* 445 U.S. 388 (1980), this Court specifically reserved and left open the issue of whether plaintiffs who settled their claims after a denial of class certification, may still appeal the denial. 445 U.S. 338 at 404, n. 10.

The Second Circuit and Eleventh Circuit have now taken diametrically conflicting positions. Opposite to the decision in the case at bar, the Eleventh Circuit held, in *Love v. Turlington,* 733 F.2d 1562 (11th Cir. 1984), that a named plaintiff that had settled his claims after denial of class certification had standing to seek appellate review.

The importance of having one standard for appellate review in all Circuits has been a consistent concern for this Court and is nowhere more important than when dealing with class actions.

In class actions, unlike many other plenary actions, the impact of a class action may cross over geographic boundaries with potential class representatives in multiple Circuits. Unless one standard is set for review, forum shopping and inconsistent results

are likely. Consequently, it would be inappropriate to allow the conflict to continue, particularly where this Court has recognized the issue and all arguments have been raised. To allow the conflict to percolate would also continue to place attorneys and named plaintiffs in a dilemma. On one hand, attorneys would have to advise named plaintiffs to accept a settlement if it reflected the sums due them; on the other hand, by so doing, the attorneys and named plaintiffs would be compromising the interests of other putative class members, to whom they also owe a duty.

Besides rendering an opinion contrary to the Eleventh Circuit, the Second Circuit has acted contrary to the reasoning previously enunciated by this Court.

This Court stated in *Geraghty,* 445 U.S. 388, that to satisfy the case or controversy requirement of Article III of the Constitution, a party only had to show a live controversy and a sufficient personal stake in the litigation. This Court held that a live controversy exists if other potential class members could be affected by the matter in controversy and that the personal stake requirement could be satisfied on either of two bases. First, if the plaintiff was acting as a "private attorney general" in his activities for the class, and second:

> As noted above the purpose of the "personal stake" requirement is to assure that the case is in a form capable of judicial resolution. The imperatives of a dispute capable of judicial resolution are sharply presented issues in a concrete factual setting and self-interested parties vigorously advocating opposing positions.

Geraghty, 445 U.S. 388 at 403-404.

In the present case, a live controversy exists as numerous

injured parties, other than the named plaintiffs, have commenced actions seeking the same relief that the within named plaintiffs sought on behalf of the class. *See Colon v. Local 363,* No. 86-2012 (E.D.N.Y., filed June 16, 1986). The personal stake requirement has been satisified also. The plaintiffs acted as private attorney generals in seeking to recover unpaid wages due under their collective bargaining agreement, New York State Labor Law § 220 and the Davis-Bacon Act, 40 U.S.C. § 276(a). Moreover, the issues are sharply presented and self-interested parties are vigorously pursuing them. Thus, under the reasoning in *Geraghty,* 445 U.S. 388, plaintiffs had standing to appeal and it was error for the Second Circuit not to consider the merits.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A—OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 6th day of November one thousand nine hundred and eighty-six.

Present: HONORABLE IRVING R. KAUFMAN,
HONORABLE JON O. NEWMAN,
HONORABLE GEORGE C. PRATT,
Circuit Judges.

86-7543

ROBERT KAMEAN, RAY E. COFFIE, and TERRELL WILLIAMS, Individually and on behalf of all other members of Local Union 363, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America,

Plaintiffs-Appellants,

v.

LOCAL 363, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, et al.,

Defendants-Appellees.

This appeal from an order of the United States District Court

for the Southern District of New York, Charles L. Brieant, *Judge*, came on to be heard on a transcript of the record, and was submitted.

ON CONSIDERATION WHEREOF, it is now ordered that the appeal is dismissed.

The three plaintiffs have appealed from an order denying their motion for class certification. They sought to represent a class consisting of all past and present members of Local 363 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America who allegedly were damaged by Local 363's failure to properly calculate the wages and pension contributions owed to them as a result of their employment in New York City public works projects. After the denial of class certification, all three plaintiffs voluntarily settled their individual claims against Local 363.

The appellants lack standing to press their appeal. They no longer have a stake in the outcome of the case, and cannot benefit in any way from a reversal of the denial of class certification. They lack the interest found to exist by the Supreme Court in *Deposit Guaranty National Bank of Jackson, Mississippi v. Roper,* 445 U.S. 326 (1980), in which the aspiring class representatives sought to spread the costs of litigation to other class members who would benefit from any recovery. 445 U.S. at 334 n.6. Here, all litigation costs are being borne by the Joint Industry Board of the Electrical Industry rather than by the plaintiffs. Since they do not stand to benefit from a favorable outcome on this appeal, the named plaintiffs lack "a legally cognizable interest in the outcome", *Powell v. McCormack,* 395 U.S. 486, 496 (1969), and no justiciable controversy is presented.

Appendix A

The appeal is dismissed.

s/Irving R. Kaufman
Irving R. Kaufman, U.S.C.J.

s/ Jon O. Newman
Jon O. Newman, U.S.C.J.

s/ George C. Pratt
George C. Pratt, U.S.C.J.

N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported cited, or otherwise used in unrelated cases before this court or any other court.

APPENDIX B—OPINION OF UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

Robert KAMEAN, Ray E. Coffie and Terrell Williams, individually and on behalf of all other members of Local Union 363, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America,

Plaintiffs;

v.

LOCAL 363, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, Gordon J. Canizio, Patrick Bellantoni, Aaron Kleinman and Richard Roes, individually and as officers or directors of Local 363, the latter name being fictitious and intended to represent all other directors or officers of Local 363; Douglas H. Windle, Gordon J. Canizio, Patrick Bellantoni, Joseph G. Canizio, Alfred Bellantoni, Aaron Kleinman, Anthony Cardillo, David Stoller, Russell Vensk, Eugene Iovine, Aaron Birdoff, Alan Westman, Murray Glick, Joe Joes, individually and as Trustees or Administrators of Local 363's Employee Benefit Trusts, the latter name being fictitious and intended to represent all other Trustees and/or Administrators of Local 363's Employee Benefit Trusts; Expert Electric, Inc., A.N. Electric Corp., Moss Electric Air Conditioning Corp., Action Electrical Contractors, Inc., Bran Electric Co., Inc., G & R Electrical Contractors, Inc., Gilston Electrical Construction Corp., Eugene Iovine, Inc., Kew Electrical Co., Inc., Lipco Electrical Corp., Monarch Electrical Contracting Corp., Neuman Electrical Corp., Supreme Electrical Corp., Tap Electrical Contracting Service, Inc., Technicon-Suriano Corp., Joseph P. Tuzzolo, Inc., Avendale Electrical Contractors, Inc. and John Does, the latter name being fictitious and intended to represent all other corporations or legal entities which were

a party to a Collective Bargaining Agreement with Local 363; Frank Micelotta, Joseph Guttman, Nicolo Argano, Lazar Moses, Anthony Spina, Richard Siedl, Gregory Rigas, Marvin Gilston, Eugene Iovine, Fivel Kahan, Gaspare Lipari, John Livia, Victor Neuman, George Holnes, Anthony Cardillo, Joseph A. Suriano, Joseph P. Tuzzolo, Gabriel Blau and Robert Roberts, the latter name being fictitious and intended to represent all officers, stockholders or partners of the John Does,

Defendants.

No. 83 Civ. 5125-CLB.

United States District Court,
S.D. New York

Feb. 7, 1986

Steven I. Levin, McDonough, Marcus, Cohn & Tretter, P.C., New York City, for plaintiffs.

Martin M. Ween, Wilson, Elser, Moskowitz, Edelman & Dicker, New York City, for G. Canizio & D. Windle—trustees.

Alan M. Pollack, Feltman, Faresh, Major & Farbman, New York City, for corporate defendants.

Nicholas R. Canizio, Oddo & Canizio, Ozone Park, N.Y., for union.

Appendix B

MEMORANDUM AND ORDER

BRIEANT, District Judge.

As set forth in their amended complaint dated October 4, 1984 and as subsequently modified by orders of this Court, plaintiffs in this case seek to maintain a class action pursuant to Rule 23, F.R.Civ.P., on behalf of themselves and others similarly situated in order to recover damages and unpaid wages and wage benefits allegedly due them in connection with their employment in certain New York City public works projects. The named plaintiffs, Robert Kamean, Ray E. Coffie, and Terrell Williams, are former members of Local 363 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America ("Local 363"). They seek to represent a class consisting of all present or past members of Local 363 who allegedly were damaged during the six years identified in the complaint by the acts and practices of all defendants.

Pursuant to § 301 of the Labor Management Relations Act of 1947, 29 U.S.C. § 185, the plaintiffs have brought suit against Local 363, the trustees and administrators of Local 363's employee benefit trusts, various employers who were parties to the union's collective bargaining agreement, and certain officers and directors of the union and its employers. Subject matter jurisdiction is founded upon these statutes and upon principles of pendent jurisidiction.

This action had received earlier consideration by this Court in connection with opposing motions for summary judgment. Relying on the recently decided case of *Action Electrical Contractors Co. v. Goldin*, 64 N.Y.2d 213, 485 N.Y.S.2d 241, 474 N.E.2d 601 (1984) (hereinafter the "*Action* action"), this

Appendix B

Court dismissed all claims premised on the theory that Local 363 employers had undercompensated plaintiffs by making cash payments of wages and/or benefits in lieu of contributions to the union pension fund. The only claims surviving summary judgment were those based on the allegation that the Local 363 employers had miscalculated the wages and pension contributions owed, so that the amounts ultimately paid—in whatever form—were less than those actually due.

Accordingly, the following claims of plaintiffs now survive: that, in violation of state and federal law and the parties' collective bargaining agreement, the employers had undercompensated plaintiffs and the class they purport to represent for work performed on public work projects in New York City; that the union and the pension fund trustees had breached their duty of fair representation and their fiduciary duty, respectively, by failing to take any action to collect these amounts due; and that the union, the employers and the trustees together "conspired" to deprive these employees of their lawful benefits.

In order to obtain the class certification that plaintiffs now seek by motion fully submitted on November 6, 1985, the plaintiffs must demonstrate that each of the four prerequisites set forth in Rule 23(a), F.R.Civ.P., have been satisfied and, in addition, that at least one of the factors described in Rule 23(b) is present. See *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 162-63, 94 S.Ct. 2140, 2145, 40 L.Ed.2d 732 (1974).

First, the plaintiffs must establish that the class they purport to represent is so numerous that joinder of all the aggrieved individuals would be impractical. *See* Rule 23(a)(1), F.R.Civ.P. In their complaint, the plaintiffs allege that approximately 1,000 other present and former Local 363 members were similarly

underpaid, a figure based on their estimate of the number of union members who had worked for Local 363 employers while the disputed payment practices were in effect. Although their supporting affidavits specifically identify only 33 potential class members of the 1,000 alleged, this discrepancy is not fatal to their request for certification, especially when the exact number of affected persons is known to the defendants and therefore could be ascertained by the plaintiffs in the course of discovery. *See Folsom v. Blum,* 87 F.R.D. 443, 445 (S.D.N.Y. 1980); *Robertson v. National Basketball Association,* 389 F.Supp. 867, 897 (S.D.N.Y.1975). This Court concludes that the numerosity element of Rule 23(a) has been satisfied.

To satisfy the second prerequisite for obtaining class certification under Rule 23(a), the plaintiffs must prove that the dispute presents questions of law or fact that are common to all members of the prospective class. *See* Rule 23(a)(2), F.R.Civ.P. This does not mean that all issues must be identical as to each member, but it does require that plaintiffs identify some unifying thread among the members' claims that warrants class treatment. *See Blackie v. Barrack,* 524 F.2d 891, 902 (9th Cir. 1975), *cert. denied,* 429 U.S. 816, 97 S.Ct. 57, 50 L.Ed. 2d 75 (1976); *Vulcan Society v. Fire Department of White Plains,* 82 F.R.D. 379, 401 (S.D.N.Y.1979).

In this case, the issues presented by the plaintiffs regarding the employers' methods of calculating their employees' wages and benefit compensation and the union's and the trustees' alleged breach of their fiduciary obligations raise common questions of fact and law sufficient to meet the requirements of Rule 23(a)(2). Each potential class member is or was a member of Local 363; each was employed by a company that had signed a collective bargaining agreement with the union; and each was subject to

the same payment practices that plaintiffs now contend were improper. Accordingly, this Court is satisfied that this requirement has been met.

The third prerequisite for maintaining a class action under Rule 23 focuses attention on the individual claims of the representative parties, i.e., the named plaintiffs, to determine whether they are sufficiently typical of those asserted by the remaining class members. *See* Rule 23(a)(3), F.R.Civ.P. To state this requirement another way, the plaintiffs must show that their interests are aligned with the interests of their fellow class members in order to ensure that each claim will be prosecuted with diligence and care. *Morgan v. Laborers Pension Trust Fund of Northern California,* 81 F.R.D. 669, 677 (N.D.Cal.1979). As applied to these facts, this inquiry substantially overlaps the concerns incorporated into Rule 23(a)(4), i.e., that the plaintiffs demonstrate they will "fairly and adequately protect the interests of the class" they seek to represent. Rule 23(a)(4), F.R.Civ.P.

Therefore, in order to maintain this action on behalf of the proposed class, the plaintiffs must demonstrate not only that they share the general interest of the absent class members in recapturing the compensation allegedly due them, but also that they do not possess other, potentially conflicting interests that could impair the faithful performance of their duties as class representatives. *See Hansberry v. Lee,* 311 U.S. 32, 44, 61 S.Ct. 115, 119, 85 L.Ed. 22 (1940). It is axiomatic that no party can fairly or adequately represent the interests of the absent class, if he is also motivated by interests adverse to the class as a whole. *See id.* at 45, 61 S.Ct. at 120. Accordingly, to satisfy this requirement, the named plaintiffs must demonstrate that neither they nor their attorneys are subject to extraneous influences that would create a conflict.

Appendix B

Sources of potential conflict are not confined to pecuniary interests. Lawsuits fueled by the spite or hostility of an unduly antagonistic litigant or by some other ulterior motive or irrational purpose unrelated to the claims alleged in the complaint may also prevent class certification. *See Norman v. Arcs Equities Corp.*, 72 F.R.D. 502, 506 (S.D.N.Y.1976).

In this case, the named plaintiffs have failed to discharge their burden to demonstrate that they possess the necessary capacity for fair representation of the absent class members. The record before me shows that two of the three named plaintiffs (and some of the proposed class members) presently belong to a rival union having a recent history of antagonism towards, and competition with, the defendant union. The third plaintiff, Coffie, has resigned from the defendant union and is presently competing with the class in the capacity of a self-employed electrical contractor. Because the representatives and the class members are united in their interest to recapture wages and benefits allegedly denied them, there is little doubt that these claims will be prosecuted vigorously. However, this Court is not prepared to infer fair representation merely from the likelihood of vigorous representation. The loyalty of two of the named plaintiffs to their present union, Local 3 of the International Brotherhood of Electrical Workers ("Local 3"), conflicts directly with the interests of those class members, a majority, who have retained their affiliation with Local 363. *See United Independent Flight Officers, Inc. v. United Air Lines, Inc.*, 756 F.2d 1262, 1285 (7th Cir.1985). Local 3 actively competes with Local 363 for covered employees and employers, and according to one survey cited by the New York Court of Appeals has enrolled approximately 90% of the unionized electrical workers in New York City. *See Action* action, 64 N.Y.2d at 218, 485 N.Y.S.2d 241, 474 N.E.2d 601. Unlike those class members who still depend upon Local 363 for their

livelihood, the named plaintiffs have no stake whatsoever in the continued economic viability of Local 363 or in its ability to survive a protracted and costly lawsuit. This conflict is itself grounds for denying class representative status to the named plaintiffs. *See Free World Foreign Cars, Inc. v. Alpha Romeo S.P.A.*, 55 F.R.D. 26, 29 (S.D.N.Y.1972). The same logic applies to a non-union electrician seeking to maintain a class action under these circumstances.

Moreover, as members of competing Local 3, at least two of the named plaintiffs possess a powerful incentive to dismember Local 363 and divide it from its affiliated contractors, an interest that would inevitably compromise their duty to seek and obtain for the absent class members the most favorable resolution of this dispute. Class representatives owe a duty to the class not only to prosecute the lawsuit vigorously, but also to consider the advantages of settlement and to negotiate wisely and prudently when settlement is in the long term interest of the class, even at the cost of possible total victory. *See Rossini v. Ogilvy & Mather, Inc.*, 80 F.R.D. 131, 135 (S.D.N.Y. 1978). If, as in this case, the class representatives are not motivated by the same interests and concerns as the absent class members, then there is no assurance that the important litigation decisions made will fairly and adequately vindicate the claims of the absent class members who will be bound by them thereafter. This observation extends to decisions in litigation of the sort which are commonly made by inaction, such as the failure to open or reopen settlement negotiations.

The disquieting entanglement of Local 3 and Local 363 members that would be engendered by this lawsuit if it were granted class action status would also afford the named plaintiffs access during pre-trial discovery to information about Local 363

employers and their records, which could be useful to Local 3 in its organizing efforts. In short, the absent class members and their own local union can expect to pay a steep price for the free prosecution of their claims offered by these individuals who seek to represent them.

The named plaintiffs have also failed to establish that their counsel would be fair and adequate advocates of the class interests. The entire cost of this law suit, including all legal fees, has been or will be paid for by an organization known as the Joint Industry Board of the Electrical Industry, which, except for one independent public appointee, is composed entirely of representatives from Local 3 and affiliated employers. According to the record submitted with this motion, there are no representatives of Local 363 on that Board.

Even if this Court accepts as true plaintiffs' assertions that the Joint Board will assume an impartial stance, that it will have no strategic input, and that its interests broadly embrace the integrity of the electrical contracting industry as a whole rather than representing a desire to favor Local 3 over another union, the Joint Board, as holder of the purse strings, will enjoy considerable, inappropriate control over this litigation simply because it is capable of withdrawing financing at any time. This threat, or even the possibility of such a threat, necessarily would compromise the independence of class counsel or, at a minimum, influence counsel to consider serving the policies of the Board and, conceivably, the interests of Local 3 as well as or instead of those of the class they purport to represent. In the words of the Gospel, which were cited with approval by the Second Circuit in *York v. Guaranty Trust Co. of New York,* 143 F.2d 503, 514 n. 15a (2d Cir.1944), *reversed on other grounds,* 326 U.S. 99, 65 S.Ct. 1464, 89 L.Ed. 2079 (1945), "no man can serve two

masters: for either he will hate the one, and love the other; or else he will hold to the one, and despise the other." Matthew 6:24.

To permit an unrelated third party to promote and finance this litigation would also require this Court to condone Maintenance, a practice that has been decried because it permits intermeddling by nonparties, and encourages litigants to advance speculative claims at no financial risk to themselves. *See Norman v. Arcs Equities Corp.*, 72 F.R.D. 502, 504 (S.D.N.Y.1976); *see also 3B Moore's Federal Practice*, ¶23-07[1.-1], at 23-218. It would be hazardous to the interests of the class if their claims against Local 363 could be held hostage to the revocable and indeed unenforceable promise of their financial supporter, the Joint Industry Board, not to interfere in this action. The Joint Board's ties to Local 3, evidenced by overlapping membership and the fact that it is funded entirely by contributions from contractors signatory to Local 3 collective bargaining agreements, provide a strong motivation and likelihood for Local 3's interests to affect the course of the litigation.

This Court acknowledges that plaintiffs' counsel have represented the interests of this inchoate class diligently and effectively in stimulating and assisting the administrative investigations conducted by the state and federal labor boards into the payment practices in dispute here. So long as government officials were doing the investigating and the prosecuting, the tensions between Local 3 and Local 363 were not implicated, and there was thus no opportunity for improper influences to come to bear on this action. Indeed, it remains quite likely that these officials will enforce the rights of the absent class as they may be found to exist or require the union or the trustees to do so. However, notwithstanding their faithful past performance, both the proposed class representatives and their counsel in this lawsuit

have critical alliances with and obligations to Local 3 that this Court finds will be impermissible and conflicting. The long shadow cast by Local 3 over this litigation threatens the fair and adequate prosecution of the class' claims, and is likely to frustrate obtaining the most advantageous resolution of a dispute existing essentially between Local 363, its members and their employers.

Accordingly, this Court finds that the named plaintiffs and their attorneys are precluded by conflicts of interests and divided loyalties from representing this class.

The motion for class certification is therefore denied.

Having determined that this lawsuit cannot be maintained as a class action, this Court hereby dismisses the action as it pertains to those defendant contractors and officers with whom the named plaintiffs have no record of employment during the applicable statute of limitations period. Orders effecting these dismissals may be proposed on ten (10) days notice, together with an affidavit setting forth the fact of no such employment. As to such dismissals, the Court declines to make the determinations required by Rule 54(b), F.R.Civ.P., for an entry of partial judgments.

Counsel for the remaining parties shall confer in order that the individual claims of the plaintiffs may be made ready for trial or otherwise resolved without delay and at minimal litigation cost.

So Ordered.